IN THE

Supreme Court of the United States

OCTOBER TERM—1934.

No. 211

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

Petitioner,

—against—

WESTCHESTER SERVICE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

GEORGE C. LEVIN,
Counsel for Petitioner.

ALFRED B. NATHAN,
LOUIS H. MOSS,
BENJAMIN LEVIN,
Of Counsel.

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—against—

WESTCHESTER SERVICE CORPORATION,
Respondent.

Petition.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Shanferoke Coal & Supply Corporation of Delaware, respectfully shows to the Court as follows:

This is an application for a writ of certiorari in order to review an order of the Circuit Court of Appeals, Second Circuit, which reversed an order of the District Court for the Southern District of New York, denying respondent's motion for a stay of all proceedings pending arbitration. The order of the Circuit Court granted respondent's said motion, with leave to the District Court to vacate the said order at any time, should it appear that respondent was in default in proceeding with the arbitration.

A.

Statement of Facts.

The complaint contains two causes of action. The first sought to recover damages for defendant's breach and repudiation of a contract for the sale and delivery of coal, entered into by it with The Hudson Coal Co., plaintiff claiming to be the beneficiary designated by the contracting parties to receive the benefits of the said contract (R. 4-7). This cause of action was not involved on defendant's motion for a stay.

The second cause of action seeks to recover damages for defendant's breach and repudiation of a contract entered into by it directly with plaintiff. By the terms of the said contract, defendant agreed to purchase 75,000 gross tons of anthracite coal, of certain specified sizes, in a period of not less than three nor more than five years, from plaintiff. The said contract further provided that defendant would order and accept delivery of said coal, during such period, in as equal monthly installments as practicable, it being agreed between the parties that delivery of said coal by plaintiff and its acceptance by defendant should extend over said period of not less than three nor over five years in as even a manner as practicable (R. 8).

It is then alleged that, by the terms of said agreement, defendant was obligated to order and accept from plaintiff, on the average, at least 1250 gross tons of coal per month. The second cause alleges further that defendant, since December 1st, 1931, without just cause, neglected and refused to order, accept or pay for at least an average 1250 gross tons of coal per month, as required by said agreement, but has ordered quantities of coal greatly below its said average monthly quota, and during several months since said date, has failed to order or accept any coal whatso-

ever from plaintiff; that defendant was in default, under its said agreement, to the extent of approximately 16,173 gross tons of coal, and that prior to the commencement of this action, defendant notified plaintiff it would not order, accept or pay for coal as provided in its said agreement, and that defendant repudiated the same (R. 8-9).

It is then pleaded that plaintiff, at all times mentioned, was ready, able and willing to perform the said agreement, with respect to furnishing, selling and delivering coal as required by the agreement, and, would have furnished, sold and delivered the same, but for defendant's said neglect, refusal and repudiation. It is alleged further that there remains to be delivered to defendant, under said agreement, in all, a balance of 52,309 gross tons of coal (R. 9).

The complaint then alleges that plaintiff, as defendant well knew, was entitled to and received commissions, by virtue of an agreement which it had with The Hudson Coal Co., upon all coal sold and delivered by plaintiff to defendant, under its agreement between the latter. Accordingly, plaintiff seeks to recover, under its second cause of action, as damages for defendant's breach and repudiation, commission in the sum of $9,851.74, which it claims it would have earned if defendant had fully performed the terms and conditions of said agreement (R. 9-10).

Defendant, after service of the complaint, made a motion addressed to the sufficiency of the first cause of action, requesting a dismissal thereof upon the ground that it failed to set forth facts sufficient to constitute a cause of action (R. 17). The District Court granted this motion, holding that plaintiff was merely an incidental beneficiary, and as such, could not sue on the contract entered into between defendant and The Hudson Coal Co. An appeal was taken by plaintiff from the order and judgment dismissing its said first cause of action, to the Circuit Court of Appeals, Second Circuit. That Court affirmed the said

order and judgment, without opinion. Thereafter, plaintiff applied to this Court for a writ of certiorari, in order to review the said determination of the Circuit Court. The said petition, it is expected, will be considered at the October Term of this Court.

Simultaneously with its motion to dismiss the first cause of action, and before answering, defendant moved for an order staying all proceedings under the second cause of action, pending arbitration. The said application was predicated upon a clause in the contract between plaintiff and defendant, which provided for arbitration. The District Court denied this motion, without prejudice to a renewal thereof, on the ground that it was premature and could not be entertained until issue had been joined by the service of an answer (R. 17-18).

Defendant served its answer on July 27th, 1933, and thereafter renewed its motion for a stay pending arbitration, upon the pleadings and upon the affidavits and papers submitted upon its former motion, and upon an affidavit setting forth the proceedings already had. This motion came on to be heard simultaneously with a motion by plaintiff to strike out defendant's second separate defense which pleaded the arbitration agreement (R. 18).

Defendant's motion was denied by the District Court, which rendered an opinion that appears in the record submitted herewith. Defendant thereupon appealed to the Circuit Court of Appeals, Second Circuit, from the order denying its said application. That Court reversed the said order and granted the defendant's motion, rendering an opinion which is reported in 70 F. (2nd) 297, and at page 73 of the record.

It is claimed in defendant's moving affidavits that a dispute arose between plaintiff and defendant as to the performance of the agreement. In this connection, defendant asserts that, subsequent to the execution of the agreement, it ordered the shipment of coal, from time to time,

and that plaintiff complied with such orders, to and including the month of December, 1932 (R. 22).

It is stated further in defendant's affidavits that, on January 3rd, 1933, defendant placed an order for the shipment of seven cars of coal; that thereafter defendant received a letter from plaintiff charging defendant with being in default in the placing of orders under the existing contracts and refusing to accept the order in question, unless defendant conceded that the acceptance of same was without prejudice to plaintiff's rights (R. 22-23, 35-36).

It is asserted further in the said affidavits that defendant's vice-president, Mr. Elkind, conversed with plaintiff's President, Mr. Goodenough, with reference to the said letter received from plaintiff, and urged that defendant was not in default under its contracts. It was claimed that Mr. Goodenough agreed that he saw no reason why his company should not fill the order for the seven cars of coal and that it would do so (R. 23).

Defendant then states that a letter was received from plaintiff's attorneys, finally declining to ship the coal in compliance with defendant's order. It is claimed that, after the receipt by defendant of the said letter, its president, Mr. Couzens, conversed with Mr. Goodenough, again urged that defendant's aforesaid order be accepted. It is claimed, also, that, prior to the giving of said order, Mr. Couzens had some discussion with plaintiff's officers and that no claim was made on the part of plaintiff, prior to January 5th, 1933, that defendant was in default in purchasing coal under its agreement with plaintiff (R. 23-24).

It is then asserted that defendant has always stood ready and willing to arbitrate its dispute with plaintiff, in accordance with the contract provisions, and still is ready and willing to comply with all of the terms of the contract, and to order and accept, within the contract term, the amount of coal required to be ordered (R. 24).

The contract provisions relating to the arbitration of disputes between the parties, reads as follows:

> "In case any dispute should arise between the Buyer and the Seller as to the performance of any of the terms of this agreement, such dispute shall be arbitrated and the cost thereof shall be borne equally by both parties. The Buyer and the Seller shall each appoint one arbitrator and the two arbitrators so appointed shall select a third arbitrator and the decision of a majority of the three arbitrators shall be final and conclusive on both parties. *In case for any reason any such arbitration shall fail to proceed to a final award, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of this arbitration agreement in accordance with the arbitration laws of the State of New York*" (R. 31). (Italics ours.)

The answering affidavits interposed by plaintiff, disclose the lack of merit in defendant's application. Thus, it is shown that, at the time the present action was instituted, in March, 1933, defendant was in default to the extent of approximately 16,173 gross tons of coal, even on the basis of a five year term. Defendant's delinquency first occurred in December, 1931 (R. 41).

The default continued until the spring of 1932, when plaintiff's president, Mr. Goodenough, communicated with defendant's vice-president, Mr. Elkind, and called latter's attention to the fact that defendant was far behind its quota. Mr. Elkind admitted his company had not been ordering and purchasing coal in the quantities required by its contract, but explained that defendant's failure to do so was due to business conditions, promising that defendant would make up its arrears in the fall, when conditions were expected to improve (R. 42).

Defendant, however, continued in default. In September, 1932, Mr. Goodenough again communicated with Mr. Elkind and called the latter's attention to the situation, pointing out that defendant was in arrears. Further assurances were given that defendant would make up its arrears shortly. These promises, however, were not fulfilled. Consequently, in December, 1932, Mr. Goodenough arranged a conference with Mr. Elkind, at the latter's office, for the purpose of discussing the situation, with a view towards having defendant meet its arrears, in accordance with the promises and assurances theretofore given (R. 42).

The conference was held on December 5th, 1932. Mr. Goodenough and Mr. Hayes, plaintiff's New York sales manager, were present as the latter's representatives. Mr. Elkind and Mr. Couzens represented defendant. Mr. Goodenough pointed out that defendant was far behind its quota and requested that immediate arrangements be made, in accordance with the assurances theretofore given, to eliminate the arrears (R. 42-43).

Then, for the first time, the true reason for defendant's default and its failure to comply with its contract, were disclosed. *Mr. Elkind stated that the true reason for defendant's continued failure to purchase coal from plaintiff in compliance with the contract, was due to the fact that defendant could obtain coal from other sources at prices lower than those required to be paid by the terms of the contract. Mr. Elkind stated further that, unless plaintiff modified the existing contract, by reducing the prices of its coal, defendant would not order or purchase any coal from plaintiff* (R. 43).

Despite Mr. Goodenough's attempt to persuade Mr. Elkind that defendant should abide by its agreement, Mr. Elkind refused to change his position, and, asserted that defendant would not purchase any coal from plaintiff unless the prices required to be paid under said agreement,

were reduced. After conferring with his associates, Mr. Goodenough found that such arrangement could not be made, and, finally so advised Mr. Elkind (R. 43).

It is clear that *defendant* intentionally defaulted and then deliberately repudiated its contract, when it could not bludgeon plaintiff into meeting its unwarranted and unjustified demand for a price reduction. In this regard, it should be noted that the facts concerning defendant's breach and repudiation of the contract as set forth in plaintiff's answering affidavits, have never been denied by defendant, although the latter had ample opportunity to do so. Thus, when defendant renewed its motion for a stay, it was fully familiar with plaintiff's contentions regarding defendant's default and repudiation. Upon the argument of defendant's first motion for a stay, in April, 1933, plaintiff's counsel delivered to defendant's attorney, copies of plaintiff's answering affidavits, which were substantially similar in content to the answering affidavits submitted by plaintiff upon the renewal of defendant's application (R. 50).

Defendant's failure to take issue with plaintiff's version of the default and repudiation of the agreement, either on its first motion, or, when it renewed its application, must be deemed an admission of the truth of plaintiff's charges. Under these circumstances, it is evident that there is no bona fide dispute concerning the performance of the contract, which is referable to the arbitration.

On January 3rd, 1933, when defendant placed its order for a small quantity of coal, it was substantially in default under its contract. Plaintiff, however, was willing to fill this order, on condition that its acceptance thereof be without prejudice to its rights under the contract. Since defendant refused to accede to this reasonable request, the shipment could not be made (R. 43).

The assertion in the affidavit submitted by Mr. Elkind in support of defendant's application for a stay, to the effect that he advised Mr. Goodenough that defendant was

not in default and urged that the question of any existing default be settled in a proper manner, is denied by the latter, who alleges that Mr. Elkind merely stated his concern would not acquiesce in plaintiff's suggestion that the shipment of coal be made without prejudice. In this regard, Mr. Elkind stated, according to Mr. Goodenough, that plaintiff could either ship the coal or cancel the order. Mr. Goodenough, as appears from his affidavit, thereupon informed Mr. Elkind that plaintiff could not make the shipment, unless it be accepted without prejudice to plaintiff's rights (R. 44). A letter confirming this position was sent to defendant by plaintiff's counsel (R. 37-38).

Defendant's moving papers are noteworthy for a significant omission. Nowhere in the moving affidavits, does there appear any unequivocal assertion that defendant is not in default under its contract. Manifestly, defendant could not truthfully make such assertion, since the undisputed facts show clearly that it was in default to the extent of approximately 16,173 gross tons of coal, when the present action was commenced (R. 41), and that it had repudiated its contract with plaintiff, taking the unjustifiable position that it would not perform its agreement, unless plaintiff complied with defendant's unwarranted and unjustified demand for a price reduction (R. 43).

In opposing defendant's application for a stay, plaintiff seasonably urged the objection that a stay should not be granted because there was no arbitrable dispute or controversy between the parties (R. 45-46). Plaintiff urged, also, the jurisdictional objection that any application, either to compel arbitration, or to obtain a stay, could be made only in the Supreme Court of the State of New York, in view of the express provisions in the contract requiring arbitration to be had in accordance with the statute of that State (R. 46).

Finally, plaintiff pointed out that defendant was not acting in good faith and that it was guilty of laches which

barred it from obtaining either arbitration, or a stay pending arbitration (R. 51-52).

B.

The Issues.

The primary issue to be determined is whether a federal court is empowered to grant a stay pending arbitration, under a contract which limits the parties, in the event arbitration is desired, to a foreign forum, and requires the arbitration to proceed under the arbitration law of such forum.

This issue necessarily involves the question whether the granting of a stay, under such contract, by a federal court, would not require a degree of superintendence beyond the court's compass.

The issue is then presented whether a mere expression of willingness to arbitrate, is sufficient to establish that the party seeking the stay, is not in default in proceeding with arbitration. This issue necessarily raises the question whether the plaintiff, if it intended to proceed to enforce its alleged claim for damages, was required, in the first instance, to initiate arbitration by naming the first arbitrator. This question involves the issue whether, in failing to name the first arbitrator, and in commencing the present action, the plaintiff was itself the party who fell in default in proceeding with arbitration.

In addition to the foregoing, there is also presented the issue whether, upon defendant's breach and repudiation of the contract, there remained any matters referable to arbitration. This issue necessarily involves the question whether the mere assessment of plaintiff's damage, would constitute an arbitrable issue.

The petitioner contends that a District Court is not

empowered to compel arbitration, or grant a stay pending arbitration, where such relief is sought, as in the instant case, under the provisions of a contract limiting the parties to arbitration in a foreign forum, and under the law of such forum. Petitioner contends that, under the circumstances present in the instant case, the granting of a stay, pending arbitration, constitutes an indirect method of compelling arbitration, which the federal court is without power to do. It is the petitioner's contention that the granting of a stay, under the circumstances present, would require a degree of superintendence beyond the compass of the federal court.

In any event, petitioner contends that, upon the facts disclosed by the record, the defendant must be deemed to have waived and abandoned any rights which it possessed under the arbitration clause, by reason of its unreasonable delay and laches. Finally, petitioner contends that no arbitrable dispute exists between the parties, and, therefore, that neither arbitration, nor a stay pending arbitration, may be granted.

C.

Reasons For Allowance of Writ.

I.

The ruling of the Circuit Court that a federal court may issue a stay pending arbitration, under a contract which requires the parties to arbitrate in a foreign forum under the law of such forum, is contrary to the great weight of authority (*The Silverbrook,* 18 Fed. [2d] 144; *The Beechwood,* 35 Fed. [2d] 41; *Gilbert* v. *Burnstein,* 255 N. Y. 348, 354).

II.

In ruling upon the right of the federal court to issue a stay pending arbitration, under the circumstances adverted to, the court below has decided an important question of federal law, which has not been, but should be settled by this Court. There is a diversity of opinion among the various district courts, upon the right of a federal court to grant a stay pending arbitration under circumstances, such as are present in the case at bar, as the court below pointed out in its opinion (70 F. [2d] 297, 298). Thus, *The Silverbrook, supra, The Fredensbro,* 18 F. [2d], 983, and *The Beechwood, supra,* hold that a federal court may not grant a stay under such circumstances, whereas, *Danielsen* v. *Entre Rios Rys. Co.,* 22 F. [2d] 326 and *The Volsinio,* 32 F. [2d] 357, take a contrary view. There is a conflict also between the federal decisions and those in the state courts. Thus, *Gilbert* v. *Burnstein,* 255 N. Y. 348, 354, is opposed to the decisions last cited.

This diversity and conflict of opinion, which was recognized by the court below, makes it desirable that a final and determinative adjudication be made by this Court upon the issue involved.

III.

The decision of the Circuit Court of Appeals also is contrary to the great weight of authority to the effect that upon defendant's breach and repudiation of its contract, plaintiff, as the injured party, had the right to institute suit immediately to recover the commissions which it had thus been prevented from earning (*Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, 589; *Rohem* v. *Horst,* 178 U. S. 1, 20; *Henderson etc.* v. *Wilson & Co.,* 235 N. Y. 489, 499; *Plunkett* v. *Comestock Cheney Co.,* 211 App. Div. 737, 741; *Lace Selling Co.* v. *Shapiro,* 249 N. Y. 68, 72), and, to the effect that, under the circumstances, neither

arbitration nor a stay pending arbitration could be granted, since no genuine arbitrable dispute existed between the parties (*Matter of Wenger,* 39 N. Y. 199, 202; Sec. 2, U. S. Arbitration Act).

IV.

The decision of the Circuit Court of Appeals is contrary to the great weight of authority to the effect that a mere assessment of damage does not constitute an arbitrable dispute (*Toledo S. S. Co.* v. *Zenith Transportation Co.,* 184 Fed. 391, 401; *Matter of American Ins. Co.,* 208 App. Div. 168, 170, 171; *Williams* v. *Ins. Co.,* 118 Misc. 799, 801; *Matter of Fletcher,* 237 N. Y. 440, 447; *Matter of Webster* v. *Van Allen,* 217 App. Div. 219; *Grody* v. *Silverman,* 222 App. Div. 526, 527.

V.

The decision of the Circuit Court of Appeals is contrary to the great weight of authority to the effect that a party who is guilty of delay and laches may not compel arbitration or obtain a stay pending arbitration (*Matter of Zimmerman* v. *Cohen,* 236 N. Y. 15, 21; *Nagy* v. *Arcas Brass & Iron Co.,* 242 N. Y. 97, 99; *Grant* v. *Pratt & Lambert,* 110 App. Div. 867, 869, affd. 186 N. Y. 611; Sec. 3 U. S. Arbitration Act).

VI.

The Circuit Court of Appeals has decided several important questions of general law relating to arbitration in a manner contrary to the great weight of authority, and has so far departed from the weight of judicial authority as to call for an exercise of this Court's power of supervision. Business men are resorting with increasing frequency to arbitration agreements. The interpretation and enforcement of such agreements has become a fertile field for

litigation. Manifestly, it is of the greatest importance to eliminate the diversity and conflict of decisions in the courts below by enunciating a definite rule of law, which will serve as a guide and standard. The importance and novelty of the issues and the conflict in the lower courts, constitutes this a proper case for consideration by this Court. In the interests of justice, therefore, the decision of the court below should be reviewed by this Court.

Your petitioner annexes hereto its brief in support of its petition.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding the said court to certify and send to this court on a day to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court; that the said order and determination of the said Circuit Court of Appeals in this cause and every part thereof, be reversed, and that the petitioner be granted such other and further relief as this Court may deem just and proper in the premises.

Dated, New York, July 20th, 1934.

SHANFEROKE COAL & SUPPLY CORPORATION OF DELAWARE,

By GEORGE C. LEVIN,
Counsel for Petitioner.

I hereby certify that I have examined the foregoing petition; that in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

GEORGE C. LEVIN,
Counsel for Petitioner.

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—against—

WESTCHESTER SERVICE CORPORATION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinion of the Court Below.

The Circuit Court of Appeals for the Second Circuit granted defendant's motion for a stay pending arbitration, reversing the order of the District Court for the Southern District of New York, with an opinion which is reported in 70 F. (2d) 297, and which appears at page 73 of the record.

The District Court rendered an opinion, which is not officially reported. This opinion is printed in the record (R. 60).

II.

Jurisdiction.

1.

The jurisdiction of this Court is based upon Judicial Code, Sec. 240, as amended by the act of February 13th, 1925 (28 U. S. C. A. 347).

2.

The order of the Circuit Court of Appeals for the Second Circuit was entered on the 23rd day of April, 1934.

3.

The jurisdiction in the District Court was based on the diversity of citizenship.

III.

Statement of the Case.

The essential facts of the case are stated in the accompanying petition of certiorari; and in the interest of brevity are not repeated here. Any necessary elaboration of the facts on the points involved will be made in the course of the argument, which follows:

IV.

Specification of Errors.

It is submitted that the court below erred:

1. In holding that section 3 of the United States Arbitration Act (9 U. S. C. A. 3) authorizes a stay pending arbitration, even though such arbitration must take place beyond the jurisdiction of the federal court and under the law of a different forum.

2. In holding that a stay pending arbitration under the circumstances adverted to, does not involve and require a degree of superintendence by the federal court, which is beyond its compass.

3. In holding that the defendant was not in default in proceeding with arbitration.

4. In holding that a mere expression of willingness to arbitrate, by the defendant, was sufficient to establish that defendant was not in default in proceeding with arbitration.

5. In holding that it was plaintiff who declared the contract between the parties to be at an end.

6. In holding that, if plaintiff meant to proceed further and enforce its claim for damages, the initiative rested on it and that plaintiff should have named the first arbitrator.

7. In holding that in failing to name the first arbitrator and in bringing suit, plaintiff was itself the party who fell in default in proceeding with arbitration.

8. In holding that plaintiff repudiated its contract with defendant.

9. In holding that defendant did not repudiate its contract with plaintiff.

10. In holding that defendant's breach and repudiation of its contract with plaintiff, presented an arbitrable issue.

11. In holding that the assessment of plaintiff's damages, constituted an arbitrable issue.

Argument.

POINT A.

The Circuit Court of Appeals erred in reversing the order which denied defendant's motion for a stay pending arbitration. Since the express provisions of the contract limit the parties, in the event arbitration is desired, to an application to the New York Supreme Court for an order compelling arbitration, in accordance with the Arbitration Law of New York, the Federal Court is not the proper forum to grant either a stay pending arbitration or to compel arbitration.

1.

After pointing out that the decisions in the district courts are in conflict upon the proposition (R. 76), the court below ruled that an agreement to submit to arbitration in a foreign court, justifies a stay of an action brought on the contract elsewhere, resting its conclusion upon the authority of several decisions by the English courts. In reaching this conclusion, we believe the court below erred.

We submit that the view taken by the District Court, is the correct one. That court, in denying defendant's motion for a stay, said:

> "To be specifically enforcible in a particular forum an agreement for arbitration must not provide for an arbitration outside the jurisdiction of that forum or under any arbitration law other than the arbitration law of that forum. *Cf. The Beechwood,* 35 F. (2d) 41, 42-43; *The Silverbrook,* 18 F. (2d) 144, 145-146; *The Fredensbro,* 18 F. (2d) 983, 984-985. For otherwise the Court which specifically enforces the arbitration agreement would find itself

without power adequately to follow up the situation, and see that its order or decree is performed by the party against whom it is made.

Inasmuch as the parties by their agreement have arranged to arbitrate the disputes arising under the contract, which is the subject matter of this suit, and have contractually agreed on the forum in which that arbitration clause is to be enforced, I think that the proper procedure for me to follow is to deny the defendant's motion in this cause for a stay pending arbitration, and to leave it to the remedies of which it may be able to avail itself in the New York Supreme Court under the Arbitration Law of New York State" (R. 62-63).

The arbitration clause involved in the case at bar expressly provides that, in the event arbitration is desired, either party may apply to the Supreme Court of the State of New York for an order compelling the specific performance of the arbitration clause, in accordance with the Arbitration Law of the State of New York (R. 31). By reason of this provision, it is evident that the parties have limited the forum to which application may be made, and the law which shall govern. Clearly, since the parties designated the particular forum to which application to compel arbitration should be made, and the law under which such arbitration should proceed, it cannot now be urged that arbitration, *or relief incidental thereto,* may be sought in some other forum and under some other law than that agreed upon by the parties.

To sustain such contention would require rewriting the contract and making a new agreement for the parties. The plain intent of the parties, however, may not be disregarded and the court may not make a new contract, under the guise of constructing or interpreting the agreement (*Magna Fire Ins. Co.* v. *Pospisil,* 52 F. [2d] 709, 711; *Kearns-*

Gorsuch Bottle Co. v. *Hartford-Fairmont Co.*, 1 F. [2d] 318, 319; *Schoonmaker* v. *Hoyt*, 148 N. Y. 425, 431).

The parties to a contract must abide by the terms thereof, and the mere fact that one of them subsequently deems his bargain a bad one, or disadvantageous, does not justify the court in permitting a repudiation of the unsatisfactory terms, nor does it warrant the court in making a new agreement by a process of construction or implication (*Rosenthal* v. *American Bonding Co.*, 207 N. Y. 162, 168-169; *Lockwood* v. *Embalmers Supply Co.*, 233 App. Div. 189, 194).

In view of the principles enunciated by the foregoing authorities, it is clear that the express provisions of the arbitration clause may not be disregarded. By the terms thereof the parties have definitely fixed the Supreme Court of the State of New York as the forum for arbitration, and the Arbitration Act of that State, as the law under which arbitration shall proceed. Their agreement is binding and should not be disregarded either by the parties or by the court.

In *Gilbert* v. *Burnstine*, 255 N. Y. 348, 354, the court said:

> "*Defendants' agreement without reservation to arbitrate in London according to the English statute necessarily implied a submission to the procedure whereby that law is there enforced. Otherwise the inference must be drawn that they never intended to abide by their pledge.* They contracted that the machinery by which their arbitration might proceed would be foreign machinery operating from the foreign court. No other fair conclusion can be drawn from their language. Their contract constitutes something more than a simple executory one subject to breach. Not only under the foreign statute but also under our own arbitration law, it has

become irrevocable in the sense that one of the parties without the consent of the other cannot deprive it of its enforcibility.

* * * * * * *

Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced. Pretexts to evade them should not be sought." (Italics ours.)

The *Gilbert* case is not distinguishable in principle from the case at bar. In both cases, the parties expressly fixed the forum and the law under which arbitration should be had. In the instant case, the arbitration clause provides that, in the event arbitration is to be had, it shall be upon application to the State court and in accordance with the State Act. It would be difficult to make the language more emphatic or clearer. Applying the maxim *expressio unius est exclusio alterius,* it follows that any other forum or law than those specified, must be excluded.

The Federal Arbitration Act applies to only such arbitration agreements as can be performed under the supervision of the United States Courts. Thus, in *The Silverbrook,* 18 F. (2d) 144, 146, the court said:

"It is plain enough that Congress intended to abolish the old rule, established in the jurisprudence, by which the federal courts refused to enforce arbitration agreements. But, however, the act seems to contemplate only such arbitration agreements as would be or could be carried out in the United States, within the jurisdiction of and *under the control and orders of the United States courts* * * *." (Italics ours.)

And at page 147, the court concluded as follows:

"* * * this court is without jurisdiction to direct the parties to proceed to arbitration as required by

> the concluding clause of that section, because the place and manner of arbitration prescribed by the terms of the contract, are beyond the jurisdiction of this court, since the hearings and proceedings thereunder cannot be held conformable to the terms of this statute * * *."

See also:

The Beechwood, 35 F. (2d) 41, 42-43.

In *The Beechwood* case, *supra,* the court pointed that, under well settled rules, the general language of the Federal Arbitration Act must be deemed limited in application, so as not to embrace arbitrations beyond the court's jurisdiction. Clearly, it is a *sina qua non* of obtaining a stay pending arbitration from the federal court, that the arbitration agreement provide for arbitration within the jurisdiction of and under the control and order of such court. Where, as in the instant case, arbitration is to be had in another forum, it is beyond the power of the federal court, either on common law principles or under the Federal Arbitration Act, to grant a stay of proceedings pending arbitration.

2.

It was suggested by defendant in the lower courts that, as the contract in question was made in New York, and was to be performed partly in that State, the contracting parties had in mind the benefits of the New York Statute, but in no way intended to exclude any other forum or the Arbitration Act of any other jurisdiction. In view of the express limitations in the arbitration clause under discussion, it is wholly unnecessary to speculate upon the motives, intent or purpose of the contracting parties. Where, as in the case at bar, the language in the contract is clear and unambiguous, the court is not justified in ignor-

ing it, or seeking to extend it beyond its plain meaning (*Graham* v. *Insurance Co.*, 43 F. [2d] 673, 674; *Hunt* v. *Triplex Safety Glass Co.*, 60 F. [2d] 92, 94).

The suggestion that neither of the parties had the Federal Arbitration Act in mind and did not consider the fact that one of the parties was a non-resident of New York, is purely speculative. The contract was approved by counsel (R. 32). It is fair to infer, therefore, that the parties were fully and properly advised regarding their rights and remedies. The court cannot speculate as to the reasonableness, or importance, of the limitations agreed upon by the parties, but must enforce them as found (*Burrows & Kenyon* v. *Warren*, 9 F. [2d] 1, 5).

It is not unreasonable or unfair to hold that the parties deliberately intended to confine themselves to the Arbitration Law of the State of New York and to the courts of that State, in the event arbitration were had. It is quite conceivable that the parties discussed the advantages and disadvantages of arbitration in different forums and under different statutes, and decided upon the courts and laws of the State of New York. However, speculation and conjecture are unnecessary. The parties agreed upon the forum and statute, and any deviation from their agreement is unjustified, either upon the facts or as a matter of law.

3.

In the court below it was suggested by defendant that, the District Court could grant a stay pending arbitration, under the provisions of the New York Statute. This contention is untenable. It is well settled that a Federal Court cannot enforce or grant relief under a state remedial statute. Thus, in *California Prune & Apricot Growers Assn.* v. *Catz American Co.*, 60 F. (2d) 788, the plaintiff appealed from an order directing it to proceed to arbitration in accordance with the terms of a certain agreement,

which required that defendant purchase from plaintiff the latter's entire stock of 1926 California prunes. The contract provided further that any disputes arising under the agreement be settled by arbitration before the Dried Fruit Association of California.

In reversing the order appealed from and denying the petition for arbitration, the Circuit Court held that a federal court has no jurisdiction to compel arbitration in accordance with a state statute, since such statute is purely remedial and creates no substantive rights which could be enforced by the federal court despite the provisions of the Conformity Act.

And in *Lappe* v. *Wilcox,* 14 F. (2d) 861, the court specifically held that a federal court could not grant a stay of proceedings under the New York State Arbitration Act. Thus, in denying the defendant's petition for a stay, the court said, at page 862, referring to the State Act:

> "And further there is nothing in the statute which suggests that it was intended to be extended beyond the courts of the state. While the statute does not in so many words refer or limit its provisions to state courts, that is its plain intent. Section 5, providing for staying the action expressly says: 'The Supreme Court [of New York State] or a judge thereof' shall grant such stay."

We submit that the power to grant a stay is incidental to and dependent upon the right to compel arbitration. It would result in an anomalous situation to hold that a court has the right to grant incidental relief, but no final relief. If the court lacks the power to enforce arbitration and follow the award to judgment—and this proposition, we believe, is clearly established—then, manifestly, it has no power to grant incidental relief, such as a stay pending arbitration.

In *The Silverbrook*, 18 F. (2d) 144, 147, it was said:

> "This court cannot direct and otherwise supervise and conclude an arbitration to be held in London, or assume to vacate, modify, or correct any award that might be made there. * * * *Nor has it power as a court of admiralty to arbitrarily reform, or modify the terms of the contract by ordering an arbitration elsewhere or otherwise than agreed upon by the parties.*
>
> Accordingly the motion to stay proceedings will be denied, and the cause will proceed in the usual course on the merits." (Italics ours.)

In the light of the foregoing authorities and the express limitations of the arbitration clause involved in the instant case, it is clear that the district court is without jurisdiction either to compel arbitration, or grant a stay pending arbitration. Such relief could only be granted by a state court, in an appropriate case.

POINT B.

No arbitrable dispute exists between the parties. Consequently, neither arbitration nor a stay pending arbitration may be had.

Defendant's application for a stay was predicated upon the assumption that disputes existed between the parties, which required arbitration under the terms of the contract. In this connection, it should be noted that defendant's moving papers do not specify the matters which it claims should have been arbitrated. In the briefs submitted in the lower courts, defendant enumerated a number of purported issues, which it claimed constituted proper subject matter for arbitration. Before considering the validity of the issue suggested by defendant, it is appropriate to in-

quire generally concerning the nature of the dispute which must exist, before arbitration may be invoked.

Frivolous or unconscionable issues may not be presented by a party as the basis for arbitration. Some degree of merit must attach to the matters concerning which arbitration is sought. Where a palpably fictitious, or unfounded, claim is asserted, an arbitrable issue is not presented.

Thus, in *Matter of Wenger,* 239 N. Y. 199, 202, the Court said:

> "Unquestionably a claim may be so unconscionable or a defense so frivolous as to justify the court in refusing to order the parties to proceed to arbitration * * *."

Even the Federal Arbitration Act (9 U. S. C. A., Sec. 2) requires that the court be satisfied that an issue is involved which is referable to arbitration, before it may grant a stay.

In the instant case, we submit that an analysis of the record readily discloses the absence of any *genuine,* or meritorious, issue which could constitute the basis for arbitration. In considering the validity of any purported disputes, suggested by defendant, it should be borne in mind that the allegations of plaintiff's answering affidavits, concerning defendant's breach and repudiation of the contract, are uncontradicted. Hence, it appears that defendant not only has been guilty of grossly defaulting in its obligation to order and purchase coal, but, also, that it repudiated its contract when its unwarranted and unjustified demand for a price reduction was rejected. Clearly, defendant's conduct constituted an anticipatory breach of contract, which warranted the immediate commencement of the present action.

The Circuit Court, although refusing to hold that there can never be a breach so plain that the promisee may not have summary judgment, even in the face of an arbitration

clause, concluded that, upon the facts in the case at bar, defendant had not repudiated the contract. This conclusion overlooks the uncontradicted assertion in plaintiff's answering affidavits that defendant's officers at the conference held on December 5th, 1932, unequivocally stated that they would not order or purchase coal from plaintiff, unless the latter agreed to a price reduction (R. 43). Clearly, the stand taken by defendant constituted a repudiation which warranted plaintiff in treating the contract at an end, and commencing the present action.

In *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, 589, this court said:

> "It is no longer open to question in this court that, as a rule, where a party bound by an executory contract repudiates his obligation * * * the promisee has the option to treat the contract as ended, so far as further performance is concerned, and maintain an action at once for the damages occasioned by such anticipatory breach."

In *Roehm* v. *Horst,* 178 U. S. 1, this court said, at page 8:

> "It is not disputed * * * also that if a contract provides for a series of acts, and actual default is made in the performance of one of them, accompanied by a refusal to perform, the other party need not perform, but may treat the refusal as a breach of the entire contract, and recover accordingly."

And at page 20, the court continued as follows:

> "If in this case these ten hop contracts had been written into one contract for the supply of hops for five years in installments, then when the default happened in October 1896, it cannot be denied that an immediate action could have been brought in which damages could have been recovered in advance for the breach of the agreement to deliver during the two remaining years."

Other authorities to the same effect are:

Bu-Vi-Bar Petroleum Corp. v. *Krow,* 40 F. (2d) 488, 490, 493;
American Can Co. v. *Garnett,* 279 Fed. 722, 724;
Dixon v. *Anderson,* 252 Fed. 694, 695;
Henderson, etc. v. *Wilson & Co.,* 235 N. Y. 489, 499.

It was suggested by defendant, in the court below, that the question concerning its shortage in orders for coal, raises an issue which requires arbitration. This contention was predicated upon a suggested ambiguity as to the meaning of the language in the contract requiring that the orders for coal, during the three to five-year period of the contract, be "in as nearly equal monthly instalments as is practicable" and "spread over such period * * * in as even a manner as is practicable" (R., p. 27).

Thus defendant stressed the phrase "in as even a manner as practicable", and, failing to give due regard to the requirement that the orders be "in as nearly equal monthly instalments," urged that it had a period of five years within which to take the specified quantity of coal. In this regard, defendant contended that it had the right to delay ordering and purchasing coal until the end of the five-year period.

Manifestly, this construction renders meaningless the provision that the coal be taken "in as nearly equal monthly instalments". Giving defendant the benefit of the entire five-year period within which to order and purchase the specified quantity of coal, upon which theory the complaint proceeds, it would appear that defendant was obliged to take approximately 1250 gross tons of coal per month, during the five years.

We do not contend that defendant was obliged to take this exact quantity each month, but it is clear that this was a fixed average from which defendant could not deviate

substantially during the period of the contract, without placing itself in default. It is undisputed that, at the time the present action was commenced, defendant's arrears aggregated 16,173 gross tons (R. 41). On the basis of a five-year term, defendant, under the express requirements of the contract, was obliged to take approximately 31,250 gross tons, up to the time that this suit was instituted. Defendant, however, has ordered and purchased only approximately fifty per cent. of its quota. In the light of these circumstances, it is obvious that there has been a substantial deviation, on the part of defendant, from the requirements of its contract.

If the words "in as nearly equal monthly instalments" are to be given any meaning, they must be interpreted to mean that defendant obliged itself to order and purchase, on the average, approximately 1250 gross tons per month. The provision in question, therefore, rebuts the contention that defendant could refrain from ordering and purchasing coal until a few days prior to the termination of the five-year period.

Were defendant's contention sustained, it would be possible for it to refuse to order or purchase coal during the first four years and eleven months of the contract period, and then seek to impose upon plaintiff the obligation of delivering the entire 75,000 tons within the last month, or, carrying appellant's argument to its logical conclusion, on the last day of the agreement. Manifestly, the parties did not intend any such absurd and harsh result.

Defendant, having ordered and purchased only fifty per cent. of its requirements up to the time that suit was commenced, it is clear that it was in default. Apart from the question of its default, it is uncontradicted that defendant repudiated the contract in December, 1932. Consequently, no legitimate dispute as to defendant's liability for its failure to take the balance of its quota, is presented. The purported issues suggested by defendant, regarding its de-

fault and repudiation of the contract, are so palpably sham that they cannot be made the basis for arbitration.

In view of these circumstances, it is evident that plaintiff's refusal to ship seven cars of coal, unless such shipment be accepted without prejudice to its rights, does not create an arbitrable dispute. It is clear from the undisputed facts, that an anticipatory breach occurred. Plaintiff, therefore, was wholly within its rights in thereafter refusing to make any shipments unless the same be accepted without prejudice. If defendant's order were given in good faith, there was no valid reason why it should refuse to accede to plaintiff's request that the shipment be accepted without prejudice to the latter's rights.

It was suggested, also, by defendant that its alleged desire to continue the contract, presented an arbitrable issue. This alleged issue was predicated upon defendant's said order for seven cars of coal, which was given in January 1933. *After* defendant's repudiation and breach of the contract, plaintiff was not required to accept any belated gesture on the part of defendant to continue with the contract. Plaintiff clearly had the right, upon the occurrence of the breach and repudiation, to adopt the position that performance of the contract was no longer required and that it could maintain its suit for damages by reason of defendant's breach and repudiation. The latter's belated gesture, obviously made for the purpose of bolstering its application for a stay, came too late to create an arbitrable issue.

The conclusion is irresistible that defendant breached and repudiated its contract, and, therefore, that there are no substantial or legitimate arbitrable disputes between the parties, concerning the performance of their agreement.

POINT C.

The Circuit Court of Appeals erred in holding that a mere assessment of damage constitutes an arbitrable issue.

As a result of defendant's breach and repudiation of the contract, the only issue that remains for determination is the amount of damage sustained by plaintiff. The court below held that this issue alone would be enough to warrant arbitration, if the merits were otherwise conceded (R. 79). We submit the court erred in its conclusion.

A mere assessment of damage, divorced from the determination of any other dispute or controversy between the parties, does not fall within the purview of arbitration. It is well settled that, where the only duty that arbitrators could perform, is the determination, assessment, or appraisal of damage, arbitration may not be had. The ascertainment or assessment of the damage sustained by a part, is merely incidental and collateral to the main controversy, and is in no wise determinative thereof. Hence, it is not a controversy, within the meaning of the Arbitration Act, enforcible as an arbitration agreement. The courts have uniformly held that provisions for the ascertainment or assessment of damage do not constitute enforcible arbitrable agreements.

An analogous situation was presented in *Matter of American Insurance Co.,* 208 App. Div. 168. In that case, an appeal was taken from an order directing that the controversy existing between the parties be arbitrated. The application for arbitration was based upon an appraisal clause contained in a policy of insurance. This clause provided that, in the event of disagreement as to the amount of loss or damage, the insured and insurer should each

appoint an appraiser, and the appraisers so appointed should appoint an umpire, who, acting with the appraisers, would then determine the amount of loss or damage. In reversing the order granting arbitration and denying the motion, the court said at page 170:

> *"A distinction, however, has invariably been observed between the reference of a collateral or incidental matter of appraisement or calculation, the decision of which is not conclusive as to the ultimate rights of the parties, except the mere matter of amount due, and the submission of all the matters that are in controversy between the parties for final determination upon the whole issue.* The distinction has been preserved because the submission of a collateral fact or of a particular question, without making the whole controversy the subject of the determination of arbitrators, is not deemed a coercive means designed to put an end to the controversy between the contentious parties." (Italics ours.)

And at page 171, the court concluded:

> "The Arbitration Law itself does not extend the hitherto recognized type of arbitration so as to include within its embracement appraisals of incidental matters which are at times provided for in contracts, * * *."

In *Toledo S. S. Co.* v. *Zenith Transportation Co.*, 184 Fed. 391, the court said at page 401:

> "It has been frequently decided that *an agreement to submit to the decision of others a question involving only calculation or appraisement or the fixing of values and the like, * * * does not constitute an arbitration under the strict rules of the common law."* (Italics ours.)

Other authorities to the same effect are:

Matter of Fletcher, 237 N. Y. 440, 447;
Matter of Webster v. *Van Allen,* 217 App. Div. 219;
Wurster v. *Armfield,* 175 N. Y. 256, 264;
Grody v. *Silverman,* 222 App. Div. 526, 527;
Williams v. *Ins. Co.,* 118 Misc. 799, 801.

The mere fact that a controversy may exist as to the amount of damage, does not transform an appraisal clause into an arbitration agreement (*Williams* v. *Ins. Co., supra,* 803). Similarly, the mere fact that a controversy may exist in the case at bar concerning the amount of damage to which plaintiff is entitled, does not constitute such issue a basis for arbitration.

In the light of the foregoing authorities, it is clear that the assessment of damage, which is the only issue remaining for determination in the instant case, cannot be the subject for arbitration. Since there were no other matters referable to arbitration, no basis existed for defendant's motion, and its application for a stay was properly denied by the District Court.

POINT D.

Defendant waived and abandoned any rights which it possessed under the arbitration clause by reason of its unreasonable delay and laches.

It is well settled that the right to arbitration may be waived or abandoned by laches, or other conduct inconsistent with an intention to arbitrate. In the instant case, it appears conclusively that defendant has been guilty of unreasonable delay in seeking to enforce its alleged rights under the arbitration clause.

Thus, although the question of defendant's default was

called to its attention as early as the spring of 1932, defendant failed to request or compel arbitration, until it made its present belated application, which was brought on only after plaintiff had taken affirmative action. It appears further from defendant's moving papers that, even in January, 1933, its attention was called to plaintiff's position concerning defendant's failure to order and purchase coal, in accordance with the provisions of the agreement (R. 23, 36-38). If defendant honestly believed that there existed any issue between the parties, referable to arbitration, it was incumbent upon it, at that time, to demand arbitration.

It appears further that, although again advised of plaintiff's position and claims in April, 1933, when defendant's prior application for a stay was argued (R. 50-51), defendant failed to take any affirmative steps to demand or compel arbitration. If defendant actually desired arbitration, manifestly, it had ample opportunity to demand and compel arbitration.

Defendant has alleged merely that it was ready and willing to arbitrate the alleged issues between the parties, but nowhere in its moving papers does it claim that it demanded arbitration or selected an arbitrator. Defendant has been content to stand by idle, without making any effort to obtain arbitration. At no time did it seek to compel arbitration. Defendant requested merely a stay of proceedings until arbitration could be had. Apparently, defendant merely desired to stay plaintiff from proceeding further and was content to let the situation remain in such indefinite state. If defendant's protestations that it has been ready and willing to arbitrate, were sincere, it would have long since moved to compel arbitration, and not merely to stay plaintiff.

It is evident that defendant sought to use the Arbitration Act as a means of gaining delay. The court should

not have assisted defendant in accomplishing this object. It was aptly said in *Matter of Zimmerman* v. *Cohen,* 236 N. Y. 15, 21:

> "The Arbitration Law was passed to expedite and facilitate the settlement of disputes and overcome the delay caused by litigation. It was not intended that such law should be used as a means of furthering and extending that delay."

Defendant has been guilty of unreasonable delay and procrastination. The Arbitration Act may not be invoked by a party who has been guilty of unreasonable delay.

In *Nagy* v. *Arcas Brass & Iron Co.,* 242 N. Y. 97, the court said:

> "* * * unreasonable delay in making the proper application may justify a finding of waiver."

And at page 99, the court said:

> "But the Arbitration Law contemplates prompt action and too long a delay in seeking appropriate relief may be construed as an indication that this claim is waived."

See also:

> *Grant* v. *Pratt & Lambert,* 110 App. Div. 867, 869, aff'd 186 N. Y. 611.

The court below held that a mere expression of willingness to submit to arbitration, was a sufficient answer to plaintiff's objection that defendant was in default in proceeding with arbitration (R. 78). We submit that a rule which establishes such criterion, is erroneous. The Federal Arbitration Act (9 U. S. C. A. Sec. 3) provides that the court:

> "* * * shall on application of one of the parties stay the trial of the action until such arbitration

has been had in accordance with the terms of the agreement, *providing the applicant for the stay is not in default in proceeding with such arbitration.*" (Italics ours.)

Clearly, something more than a mere expression of willingness to arbitrate, belatedly made upon an application to obtain a stay, is required of the movant. The latter must adduce *facts* showing supporting the assertion of readiness and willingness to submit to arbitration. A bare assertion, unaccompanied by any substantiating facts, is insufficient. In the case at bar, defendant's conduct and actions—or lack of action—belie its assertion of willingness to submit to arbitration.

Clearly, both State and Federal Acts require that the party seeking arbitration, or a stay until arbitration is had, act promptly. To grant a stay in the case at bar, in view of defendant's unreasonable and unexplained delay, places a premium on delay in enforcing arbitration, thereby frustrating the purpose and intention of the Arbitration Law, which is to secure a speedy termination of a controversy. Defendant's unreasonable delay in seeking to compel arbitration, constituted a bar to its application for a stay.

CONCLUSION.

For the reasons stated in the petition and this brief, it is respectfully submitted that this application for a writ of certiorari should be granted.

Respectfully submitted,

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